



§ 2254 action.<sup>1</sup> That action was considered and dismissed on the merits. Kratville v. Runyon, 90 F.3d 195 (7<sup>th</sup> Cir. 1996)(a dismissal for untimeliness is a dismissal on the merits); *see also* Nwosun v. General Mills Restaurants, Inc., 124 F.3d 1255, 1257 (10<sup>th</sup> Cir. 1997), cert. denied, 523 U.S. 1064, 118 S.Ct. 1396, 140 L.Ed.2d 654 (1998).

Before a second or successive petition may be adjudicated in the district court, the petitioner must move in the appropriate court of appeals for an order authorizing the district court to consider the petition. 28 U.S.C. § 2244(b)(3)(A). Apparently, the petitioner has not yet sought and obtained the authorization from the Sixth Circuit Court of Appeals needed for this Court to consider his current petition.

### **R E C O M M E N D A T I O N**

Therefore, without the appropriate authorization, the undersigned respectfully RECOMMENDS that the Court DENY the respondent's Motion to Dismiss and TRANSFER this case to the Sixth Circuit Court of Appeals for further consideration. 28 U.S.C. § 1631; In re: Sims, 111 F.3d 45, 47 (6<sup>th</sup> Cir.1997).<sup>2</sup>

Any objections to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of receipt of this notice and must state with particularity the specific portions of the Report and Recommendation to which objection is made. Failure to file written

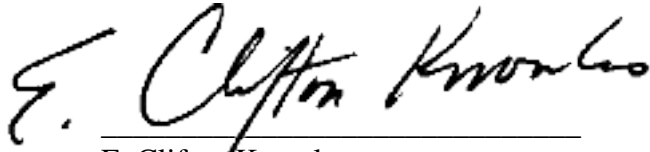
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<sup>1</sup> Michael Neely v. Kevin Myers, Warden, No. 3:01-0050 (M.D. Tenn.)(Campbell, J., presiding)(dismissed on 3/29/01 as untimely). *See* Docket Entry No. 4; Attachment Nos. 4 and 5.

<sup>2</sup> In a footnote to his Motion to Dismiss, the respondent urges the Court to dismiss rather than transfer this action. However, without the proper authorization from the Circuit Court of Appeals, this Court lacks the jurisdiction it would need to dispose of the case on its merits.

objections within the specified time can be deemed a waiver of the right to appeal the District Court's Order regarding the Report and Recommendation. See Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); United States v. Walters, 638 F.2d 947 (6<sup>th</sup> Cir.1981).

Respectfully submitted,

A handwritten signature in black ink, reading "E. Clifton Knowles". The signature is written in a cursive, flowing style. The first letter "E" is large and stylized. The signature is positioned above a horizontal line.

E. Clifton Knowles  
United States Magistrate Judge